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**IN THE
COURT OF APPEALS OF INDIANA**

JOSEPH PENNY,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 18A02-0604-CR-292

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable John M. Feick, Judge
Cause No. 18C04-0407-FB-12

November 6, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Joseph Penny (“Penny”) appeals the trial court’s order revoking his probation and ordering him to serve his previously suspended sentence for attempted robbery. A single probation violation is sufficient to sustain the revocation of probation. The trial court found eleven probation violations, and Penny only challenges four of them. In addition, Penny admitted to smoking marijuana while on probation. Therefore, we affirm the decision of the trial court.

Facts and Procedural History

Penny pled guilty to the charge of attempted robbery as a Class C felony,¹ and the trial court imposed a sentence of four years. The trial court suspended the entire sentence but ordered Penny to serve six months on electronic home detention and two years on supervised probation. Less than six months after Penny was sentenced, the State filed a petition to revoke Penny’s probation. The petition listed eleven different probation violations, including five separate positive marijuana tests, three instances of presence at an unauthorized location, failure to return home as scheduled, failure to report as scheduled, and refusal to take a drug screen.

At the probation revocation hearing, the State introduced into evidence State’s Exhibits 2-5, the positive results of four of Penny’s drug tests, and State’s Exhibits 6-9, the chain of custody forms for each of the four urine specimens that tested positive for marijuana. After questioning Richard Little (“Little”), Penny’s case manager from Delaware County Community Corrections, about the proper refrigeration of urine

¹ Ind. Code § 35-42-5-1; Ind. Code § 35-41-5-1.

specimens used for drug tests, Penny's attorney objected to the admission of all of the State's exhibits, arguing that "[t]here's no foundation that has been laid that is sufficient" and that admission of the exhibits "totally denies my client the opportunity to cross-examine and confront those pieces of paper." Tr. p. 24. The trial court overruled Penny's attorney's objection and admitted the exhibits, stating that it was taking judicial notice of the fact that urine specimens "ha[ve] to be kept cool." *Id.* at 24-25.

In addition to the State's exhibits, the State presented testimony that Penny had been at unauthorized locations, failed to return home as scheduled, failed to report as scheduled, and refused to take a drug screen. Furthermore, Little testified that Penny twice admitted to using marijuana while on probation, and Penny himself testified to having smoked marijuana at least once while on probation. At the end of the hearing, the trial court said to Penny, "Even notwithstanding the accuracy of the tests, etc., you've admitted two times used [sic] marijuana, knew you shouldn't have done it." *Id.* at 36.

After the hearing, the trial court entered an order finding that the State had proved all eleven violations listed in the petition to revoke probation and ordered Penny to serve his previously suspended four-year sentence. Penny now appeals.

Discussion and Decision

On appeal, Penny argues that the trial court erred in revoking his probation. Specifically, he claims that four of the drug test-related probation violations found by the trial court were based on the trial court improperly taking judicial notice of the fact that urine specimens are supposed to be kept cool. Without reaching the issue of whether the trial court erred in taking judicial notice, and therefore in citing Penny's failed drug tests

as probation violations, we conclude that Penny's other probation violations and his admissions to smoking marijuana are sufficient to support the trial court's decision to revoke his probation.

A probation revocation hearing is civil in nature, and the State need only prove the alleged violations by a preponderance of the evidence. *Cox v. State*, 706 N.E.2d 547, 551 (Ind. 1999), *reh'g denied*. We will consider all the evidence most favorable to the judgment of the trial court without reweighing that evidence or judging the credibility of witnesses. *Id.* If there is substantial evidence of probative value to support the trial court's conclusion that a defendant violated any terms of probation, we will affirm its decision to revoke probation. *Id.* "Evidence of a single probation violation is sufficient to sustain the revocation of probation." *Smith v. State*, 727 N.E.2d 763, 766 (Ind. Ct. App. 2000).

The petition to revoke Penny's probation alleged eleven violations. The trial court found eleven violations. Penny challenges only four of those findings on appeal. That leaves seven other probation violations unchallenged.² Because each of these violations alone would have been sufficient to support the trial court's decision to revoke Penny's probation, *see id.*, all of them taken together are certainly sufficient. In addition, Penny himself admitted during the hearing that he had smoked marijuana while on probation, and Little testified that Penny twice admitted to him that he had used marijuana while on probation. Marijuana use was a clear violation of the rules of Penny's probation. *See*

² One of the violations Penny does not challenge is a positive drug test from October 21, 2005. The State presented no evidence at the hearing to support this alleged violation. Still, the trial court found as one violation that Penny "tested positive for marijuana on 10/21/05[.]" Appellant's Br. p. 12. Because Penny does not challenge this violation on appeal, and because Penny's other violations are sufficient to support the revocation of his probation, we need discuss this violation no further.

State's Ex. 1, p. 3 ("While on probation, **You Shall Not Use Any Mood Altering Substances or Marijuana**[.]").

As Penny only challenges four of the eleven probation violations found by the trial court and admits to having used marijuana while on probation, we affirm the trial court's decision to revoke Penny's probation.

Affirmed.

BAKER, J., and CRONE, J., concur.